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No. 89-784

In The

Supreme Court of the United States

October Term, 1989

PATRICIA SWANSON,

Petitioner,

v.

ELMHURST CHRYSLER PLYMOUTH, INC.,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether nominal damages can be awarded under Title VII of the Civil Rights Act to a plaintiff who is not entitled to reinstatement, back pay or other equitable relief.

2. Whether an employer's admittedly ribald or off-color sense of humor can be sufficient to create a hostile work environment actionable under Title VII of the Civil Rights Act.

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REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

In this petition, Patricia Swanson ("Swanson") asks this Court to hold that the remedies encompassed by Title VII of the Civil Rights Act (42 U.S.C. §2000e, *et seq.*) are not limited to back pay, reinstatement and other forms of equitable relief. Rather, Swanson claims that Title VII should be interpreted expansively to create a remedy of nominal damages in hostile work environment cases. Because an award of damages is not permissible under Title VII, nominal damages may not be awarded merely

as a vehicle to enable the plaintiff to recoup attorney fees and costs.

Even if Swanson were to succeed in expanding the scope of equitable remedies provided by Title VII to include a damages remedy, Elmhurst Chrysler-Plymouth ("Elmhurst") submits that Swanson did not prove the existence of a hostile work environment under the test established by this Court in *Meritor Savings Bank v. Vincent*, 477 U.S. 57 (1986).

II.

A. The Seventh Circuit's Interpretation Of The Scope Of Judicial Remedies Available Under Title VII Is Correct.

After a trial on the merits, the district court rejected Swanson's claim that she had been terminated from her employment at Elmhurst for reasons related to sex discrimination. *See, Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 822 F.2d 1235 (7th Cir. 1989). The district court ruled that Swanson's dismissal was in fact the product of a personality conflict with her immediate supervisor, Ms. Sherry Kullen. Despite this finding, on reconsideration, the district court stated that Swanson had been previously subjected to a "hostile work environment" at Elmhurst and was entitled to nominal damages and attorney's fees – even though her discharge was completely unrelated to the work environment and her termination was legally proper. In her petition for a writ, Swanson accepts these key factual findings of the district court and admits that her termination did not constitute a Title VII violation. *See*, Petition for Writ of Certiorari at 5. Thus,

Swanson's claim rests solely upon the proposition that Title VII provides a damages remedy in addition to equitable remedies.

The Seventh Circuit Court of Appeals in the *Swanson* case and in *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180 (7th Cir. 1986), has correctly held that nominal damages is not a species of judicial relief which is available under Title VII. The remedies provision of Title VII is quite explicit in limiting a petitioner to back pay, reinstatement or other forms of equitable relief:

> "If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g).

Prior to this Court's decision in *Curtis v. Loether*, 415 U.S. 189 (1974), there was some question as to whether the remedial provisions of Title VII could be interpreted to permit an award of damages in addition to equitable relief. One year prior to the *Curtis* decision, the Second Circuit issued its decision in *Gillin v. Federal Paper Board, Inc.*, 479 F.2d 97 (2nd Cir. 1973).

In *Gillin*, the plaintiff sued for $250,000.00 in compensatory damages. With very little analysis, the court stated,

in dicta, that compensatory damages might possibly be awarded in a Title VII action. 479 F.2d at 103.

In light of the subsequent *Curtis* decision, it became apparent that Title VII remedies were limited to equitable relief only and that the *Gillin* dicta regarding compensatory damages was an erroneous interpretation of Title VII. Virtually every circuit court, which has subsequently considered the issue, has rejected *Gillin's* dicta on compensatory damages. *See, Walker v. Ford Motor Company,* 684 F.2d 1355 (11th Cir. 1982), and cases cited therein; *accord, Bohen, supra,* 799 F.2d at 1184.

Although *Gillin* was wrongly decided, it became the key case in the subsequent development of the nominal damages issue in some of the federal circuit courts.

Gillin was the only circuit court of appeals case relied on in *Joshi v. Florida State University,* 646 F.2d 981, 991 n. 3 (5th Cir. 1981). Although *Gillin* did not deal with nominal damages *per se,* the *Joshi* court apparently considered that the *Gillin* holding, with respect to compensatory damages, was equally applicable to nominal damages under Title VII.

Joshi, in turn, was relied upon by the First Circuit in *T & S Service Associates v. Crenson,* 666 F.2d 722 (1st Cir. 1981). The First Circuit did not engage in any thorough analysis of the nominal damages issue.

Since *Joshi* was a Fifth Circuit case, it assumed immediate precedential value with the creation of the Eleventh Circuit Court of Appeals. *Joshi,* therefore, became the basis for an award of nominal damages in *Henson v. City of Dundee,* 682 F.2d 897, 905 (11th Cir. 1982). *Henson* was

relied upon in the subsequent Eleventh Circuit case of *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905 (11th Cir. 1988). The Fourth Circuit case of *Katz v. Dole*, 709 F.2d 251, 253 n. 1 (4th Cir. 1983), relied exclusively on *Joshi*.

Thus, the array of authority, marshalled by Swanson in support of her nominal damages argument, is neither impressive nor persuasive. Far from being a product of reasoned judicial analysis, the cases cited are, in actuality, nothing but a series of erroneous interpretations of Title VII, originating primarily in the *Gillin* dicta and unwittingly compounded year after year. *See*, Petition for Writ of Certiorari at 9-10 where Swanson relies upon this particular line of case law.

Where courts have refused to blindly adhere to past precedent on the nominal damages issue, they have concluded that the language of Title VII itself does not permit an award of damages to a plaintiff. The Seventh Circuit reached precisely that conclusion in *Bohen* and in *Swanson*. Similarly, in *Harrington v. Vandalia-Butler Bd. of Ed.*, 585 F.2d 192 (6th Cir. 1978), the court conducted an independent analysis of the damages issue under Title VII and determined that nominal damages were not a permissible remedy.

Damages, whether nominal, compensatory or punitive, are not permissible under Title VII of the Civil Rights Act and the Seventh Circuit has correctly decided the issue here.

B. "Nominal" Damages Are Damages And Cannot Be Equated With Equitable Relief.

In her petition, Swanson suggests that "nominal" damages are not damages at all but rather are a means of judicial recognition that a right has been violated. Petition for Writ at 9. Swanson's argument is based on a patent oversimplification of the purpose of "nominal" damages. "Nominal" damages are available only if compensatory damages can be theoretically obtained but tangible loss has not been proved. *Carey v. Piphus*, 435 U.S. 247 (1978). Under Title VII, compensatory damages are unavailable under any circumstances. Therefore, "nominal" damages cannot be awarded. The Seventh Circuit has utilized this analysis in Title VII cases. In *Swanson*, the Seventh Circuit specifically adopted the district court's reasoning in *Bohen v. City of East Chicago, Indiana*, 622 F.Supp. 1234 (1985). As the district court stated in that case:

> "Although I understand why some courts permit the award of nominal damages, I do not agree with their decisions. Nominal damages are not "equitable" relief within the meaning of Title VII. The statute does not mention them, and I could not award them without offering the defendants a jury trial. Too, "nominal" damages are not something a court awards just to keep a case alive. The traditional award of one dollar is the remedy in a case in which compensatory relief is available in principle, but plaintiff did not establish the amount of injury and so cannot obtain a substantial award. Substantial injury yields a substantial award, nominal injury a nominal award. See *Carey v. Piphus*, 435 U.S. 247, 262-67, 98 S.Ct. 1042, 1051-54, 55 L.Ed.2d 252 (1978). A judge who lacks the power to award

> substantial damages that have been proved – and Bohen's anguish would support award of at least $20,000 in compensatory damages – may not use nominal damages as heart balm. The reasons that block an award of actual damages also block an award of nominal damages. See *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192, 198 n. 6 (6th Cir. 1978)."

Moreover, as the district court in *Bohen* recognized, the allowance of "nominal" damages under Title VII would raise Seventh Amendment trial by jury issues. If damages are not available, the Seventh Amendment does not apply.

In short, Swanson's only viable claim at this point is not for equitable relief, reinstatement or back pay, which are the extent of the remedies permitted under Title VII. It is apparent that Swanson seeks to recover damages for a supposedly hostile work environment at Elmhurst, where she was formerly employed. However, she cannot obtain any equitable relief since she was legally terminated before this lawsuit was filed. The only relief which she could possibly pursue is one for damages. But that route has been foreclosed by Title VII itself.

C. Recent Supreme Court Decisions Support The Seventh Circuit's Ruling.

The impetus behind "nominal" damages awards is often to serve as a predicate for the allowance of attorney's feed and costs to a plaintiff. Recent decisions by this Court have emphasized that a plaintiff must be entitled to some relief in order to be considered a "prevailing party" for the purpose of attorney's fee awards. Although

these cases involved claims under 42 U.S.C. §1988, the legal principles underlying these decisions apply with equal force to Swanson's Title VII claims.

In *Hewitt v. Helms*, ___ U.S. ___, 107 S.Ct. 2672 (1987), this Court held that a plaintiff must be entitled to some relief on the merits of his claim in order to be considered a "prevailing party" under 42 U.S.C. §1988. If neither damages nor equitable relief is available, the mere judicial statement that the plaintiff's rights were violated is not sufficient to confer prevailing party status on the plaintiff. 107 S.Ct. at 2676-77. The *Hewitt* rule was recently affirmed in *Rhodes v. Steward*, ___ U.S. ___, 109 S.Ct. 202 (1988).

Here, the District Court made the judicial statement that a hostile work environment existed at Elmhurst vis-a-vis the plaintiff. However, no relief was available to the plaintiff, because she had been terminated for a valid, non-discriminatory reason. Under these circumstances, as in *Hewitt*, Swanson could never have become a prevailing party entitled to attorney's fees.

Hewitt and *Rhodes* provide additional support for the Seventh Circuit's decision here. Indeed, *Hewitt* and *Rhodes*, being settled law, amply justify denial of the petition for writ of certiorari here. The issues raised by Swanson are, at their root, merely a rephrasing of the question, already decided in *Hewitt* and *Rhodes*, albeit clothed in a Title VII content. Certiorari is unwarranted in this case based on the prior precedent established by this court and the limited nature of the issue presented.

III.

SWANSON WAS NOT SUBJECTED TO A HOSTILE WORK ENVIRONMENT

In the event that the Court should determine that certiorari should be granted with respect to the "nominal" damages issue, the Court must then address a still thornier issue: whether an employer's ribald sense of humor can rise to the level of prohibited sexual harassment. This inquiry, of necessity, raises First Amendment concerns about the viability of Title VII hostile environment claims where the employer's speech is involved.

In *Meritor Savings Bank v. Vinson*, ___ U.S. ___, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), the Supreme Court held that sexual harassment in the workplace is a form of employment discrimination prohibited by Title VII. The elements necessary to constitute a sexual harassment claim under Title VII are as follows:

> "(1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability."

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), interpreting *Meritor Savings Bank*, 106 S.Ct. at 2404-06; *accord, Highlander v. KFC National Management Co.*, 805 F.2d 644 (6th Cir. 1986). Some courts have

included a sixth element, i.e., that the employee has acted reasonably under the circumstances. *Volk v. Coler,* 638 F.Supp. 1555, 1558 (C.D. Ill. 1986) and cases cited therein.

Implicit in these criteria is the notion that the sexual harassment must be sufficiently pervasive and debilitating to create a hostile work environment. As stated by this Court, the harassment must be "sufficiently severe or pervasive to alter [the victim's] conditions of employment and create an abusive working environment". *Meritor Savings Bank, supra,* 106 S.Ct. at 2406.

In reviewing hostile work environment claims, the trier of fact must consider the totality of the circumstances in light of the evidence presented. *Rabidue v. Osceola Refining Co.,* 805 F.2d 611, 620 (6th Cir. 1986). Offensiveness of the conduct, if any, cannot be judged by simply proving that sexual remarks were made without considering the context of the remarks. *Downes v. F.A.A.,* 775 F.2d 288 (C.A. Fed. 1985). The circumstances present in the work environment must be assessed from the perspective of a reasonable person's reactions to like circumstances. *Rabidue,* 805 F.2d at 620. If the hypothetical, reasonable person would have been harmed by the alleged conduct, then the plaintiff must further demonstrate that she herself was offended and suffered some degree of injury as a result of the abusive and hostile environment. *Rabidue,* 805 F.2d at 620.

Isolated or sporadic instances of harassment are insufficient to create an abusive working environment. *Katz v. Dole,* 709 F.2d 251, 256 (4th Cir. 1983); *Volk v. Coler, supra,* 638 F.Supp. at 1558. Repetitive, pervasive, and psychologically debilitating effects must be shown by the

plaintiff to state a claim for sexual harassment. *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213-14 (7th Cir. 1986).

Applying the foregoing tests to the present case, it is clear that the Swanson evidence fell far short of meeting the legal criteria of a sexually harassing environment. Even interpreting the evidence most favorably to Swanson, there was no showing that Roger Meacham's behavior[1] created a pervasive, debilitating work atmosphere which would have affected the psychological well-being and work performance of a reasonable female employee.

All of the witnesses in this case, including Swanson, have testified that Meacham was an inveterate, irrepressible prankster. He would kid and tease all his employees, both male and female. The employees, in turn, often played pranks on Meacham, e.g., hosing him down, spraying him with shaving cream, etc.

Meacham did not merely tolerate a light-hearted, playful atmosphere at Elmhurst Chrysler, he actively encouraged it. In his thirty years of experience in the automobile sales trade, he had found this style of management to be the most effective way to get the job done. Swanson's witness, Briedes, admitted that Meacham's antics were done light-heartedly and in jest. (T. 89-90)

Informality was the hallmark of Meacham's management style and jokes were an integral part of effectively imparting that style into the working environment at Elmhurst Chrysler. While Swanson may not have appreciated Meacham's brand of humor, even she admitted that

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[1] Roger Meacham was the manager at Elmhurst whose conduct was found to be sexually harassing by the Court.

it was Meacham's way of fostering informality at work. (T. 189)

Other female employees found the work environment at Elmhurst Chrysler to be very pleasant. These employees variously described the atmosphere as informal, friendly, familial, and a nice place to work. They were aware of Meacham's penchant for teasing and kidding, but considered it a "happy type of kidding". (T. 228) None of them took it seriously. All of these employees testified that they had never seen Roger Meacham conduct himself in a lustful or sexual manner towards any female employee.

The picture of the working environment at Elmhurst Chrysler, which emerges from the testimony at trial, is hardly the stuff of which Title VII violations are made. "Harassing", "abusive", and "psychologically debilitating" would actually be the most inappropriate possible adjectives with which to describe the environment at Elmhurst Chrysler. What is really in issue here is not the working atmosphere of Elmhurst Chrysler, but rather Roger Meacham's sense of humor. The plaintiff Swanson found his humor offensive. Other female employees did not.

Viewed in the context of Meacham's management style and the totality of the circumstances, each and every incident of "sexual harassment" alleged by Swanson, had humor underlying it. Meacham's humor may have been ribald or off-color at times. However, it was certainly no more bawdy than many of Chaucer's Canterbury Tales or, for that matter, many of the programs aired on prime-time TV. Title VII has never been interpreted to prohibit

bawdy jokes – nor should it be. Title VII is simply not a "clean language Act". *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 n. 2. Placed in proper context, the alleged incidents of sexual harassment were actually nothing more than part of the good-natured kidding engaged in by virtually all of the employees at Elmhurst Chrysler.

If Title VII is interpreted to bar Meacham's off-color sense of humor (which is not obscene in any sense of the word), serious First Amendment concerns arise and the constitutionality of Title VII itself is called into question.

There is no necessity of reaching these difficult issues, however, Certiorari should be denied because Swanson's case is neither meritorious nor does it present matters of crucial importance for this Court to decide.

CONCLUSION

For these reasons, Swanson's petition for a writ of certiorari should be denied.

Respectfully submitted,

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